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The "Free" Access to Online Platforms: Can personal data be treated as consideration from a VAT perspective?

by

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Table of Content

Abstract

Nowadays, many digital platforms, such as searching engines, social networks and multiple applications serving the needs of private individuals, provide their users with free access to its resources and functions. Such generosity, together with the fact that these companies are highly capitalised, leads to the question: is there any consideration paid by the users, which the platform can subsequently convert into monetary profits?

The present thesis examines the assumption that the users "pay" with their personal data for the e-services provided by platforms, which results in the taxable transaction for VAT purposes. The relevant VAT rules together with the CJEU case law are applied to analyse whether this hypothesis fits into the existing VAT system.

The results of the analysis indicate that while the status of platforms and the classification of the supply in question do not pose significant difficulties, there are concerns about the expression of personal data in monetary terms. Furthermore, the real-life examples illustrate the lack of binding nature in the relationships between platforms and its users, which challenges the presence of direct link, necessary for VAT purposes. Besides, the potential VAT taxation of such supply of e-services is discussed from the practical point of view, with the focus on the business reality of the analysed platforms as well as the nature and role of personal data in the modern economy.

Preface

I would like to express my gratitude to the coordinators of the Master's Programme in European and International Tax Law at Lund University for the opportunity to become a part of the international tax community and meet outstanding professors and tutors. Many thanks to the invited lecturers: Professor Sigrid Hemels, Associate Professor Jérôme Monsenego, Dr Jesper Johansson, Dr Katarina Fast, Andrzej Kaznowski, Caspar Jansen, Alexandra Alm, who each shared their knowledge, experience and, most importantly, the passion for the field of their professional interest.

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I express my deep gratitude to all classmates, who enriched not only my professional but also personal experience. Hope to you see you all at some point in the future, wherever in the world each of you ends up. Besides, this year gave me a great chance to understand the importance of family support. I cannot emphasise less how thankful I am to my parents Natalia and Ruslan Ingman and my brother Gleb Ingman for their constant encouragement and understanding.

I would like to dedicate this thesis to Associate Professor Oskar Henkow, who in the short time managed to earn our respect and conquer our hearts. Thanks to his passion and genuine interest in the legal practice we have "VAT in our DNA".

Abbreviation list

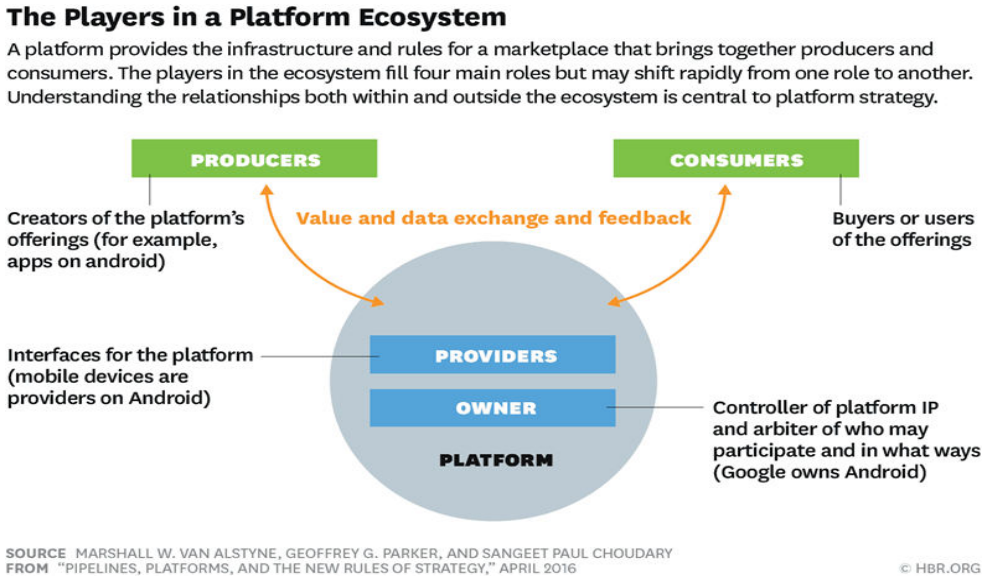
AG	Advocate General
art.	article(s)
B2B	Business-to-Business
B2C	Business-to-Customer
CJEU/ The Court	the Court of Justice of the European Union
e.g.	for example
e-services	electronic services
EU	European Union
MS	Member State(s)
OECD	The Organisation for Economic Co-operation and Development
p.	point
para.	paragraph
paras.	paragraphs
pg.	page(s)
sent.	sentence
subpara.	subparagraph
VAT	Value Added Tax
VAT Directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347 of 11 December 2006
VAT-D	-//-

1. Introduction

1.1. Background

The widespread access to computers, modernisation of countries around the world and increased utilisation of smartphones led the increase of a total number of the Internet users from 1,37 billion to 3,58 billion over past ten years[1]. This growth affects people's daily life as well as influences the global economy and businesses. Nowadays companies are forced to implement various digital technologies and apply new business models[2] at the existing markets.

One of these modern business models relies on the concept of digital platform. Such companies (platform businesses or platforms) connect producers and consumers in two-sided markets by generating value for both groups[3] (see pic. below). While the platforms, as such, are not new phenomena – e.g. malls link consumers and traders, newspapers connect subscribers and advertiser –, the use of information technologies made it significantly easier to organise a platform, especially in the form of a website or mobile application.



Many companies applying the platform-based business strategy decide to "subsidise" one group of consumers to attract another one[4]. While the group

[1] Statistic Portal "Statista" [Electronic]: "Number of internet users worldwide from 2005 to 2017 (in millions)"

[2] The business model is defined as "sets of decision variables that allow firms to use and coordinate their resources to create and deliver value to customers for appropriate monetary compensation" (Heiko Wieland, Nathaniel N. Hartmann, Stephen L. Vargo (2017). "Business models as service strategy", Journal of the Academy of Marketing Science)

[3] M.W. Van Alstyne, G.G. Parker & S.P (2016). "Pipelines, Platforms, and the New Rules of Strategy", Harvard Business Review, pg.1

[4] Ibid, pg. 3

constituting the main revenue partner of the platform pays for the online services, another group receives access to it free of charge[5]. Two following factors predetermine such business strategy. Firstly, the commercial success of the online platforms depends on an increasing number of producers and consumers connected: the bigger pool of consumers using the platform increases the value of it for the producers ("indirect network effect"[6]). Secondly, regardless the existence of several groups of users, the company shall choose a primary customer group[7], whose needs will determine the platform's performance[8]. This group is more likely to be released from any charges for the platform's services. As a result, from an economic perspective, the platform offsets the expenses of the provision of services for free to one group of customers with an income generated from the commercial relationships with another group.

In the case when the private users end up being free from any charges, strictly speaking, they consume platform resources free of charge. As VAT constitutes a general tax on consumption and relies on the principle of neutrality, the interaction between the platform as supplier and users as consumers should trigger the taxation.

However, for the VAT to be applicable, the supply needs to be performed for the consideration. At first sight, under the presented circumstances, users do not pay for the access to the websites and use of its resources. Upon a closer view, the platforms in question do not only apply the same business strategy but also heavily rely on the personal data provided by the users. As further described in Chapter 3, the companies may collect the data in an explicit form, via an obligatory registration procedure, or implicitly – by requesting an accept of the website cookies policy[9]. This information is used by the companies for commercial purposes: they either analyse it and apply the results to improve the customer's experience at their website or make the data available to the business clients, such as advertisers. Since personal data plays the significant role in the platforms' value creation, it should be somehow "acquired" by them in the first place. This may lead to the assumption that from a VAT perspective, there is a

[5] K. Täuscher (2016). "Business Models in the Digital Economy: An Empirical Study of Digital Marketplaces", Fraunhofer MOEZ, pg. 19

[6] C. Zhang and W. D. He (2013). "Impact of Indirect Network Effect between Two Sides on the Diffusion and Pricing of Platform", Applied Mechanics and Materials, pg. 1

7 A.M. Bal (2018). "United Kingdom/European Union - Managing EU VAT Risks for Platform Business Models", Bulletin for International Taxation, pg. 3

[8] E.g. Amazon's company mission – "to be the Earth's most customer-centric company"– indicates that the consumers are their primary customers. (https://www.amazon.jobs/working/working-amazon)

[9] "A cookie is a small piece of data that a website asks your browser to store on your computer or mobile device. The cookie allows the website to 'remember' your actions or preferences over time" (Information Providers Guide, European Commission, Section "Cookies: http://ec.europa.eu/ipg/basics/legal/cookies/index_en.htm).

taxable transaction when a platform supplies access to its online resources in exchange for personal data, which represents, thus, a consideration[10].

1.2. Relevant online platforms

The present research exclusively focuses on the platforms, which connect producers (or third parties) represented by companies[11] and consumers, who do not have to pay any direct consideration for access to platforms' resources. The relevant platforms may be classified by their revenue streams[12]:

1) The advertising model: companies depends on fees paid by advertisers for an opportunity to access potential customers. There are different types of websites, which fall under with category:
   a. Media resources, such as news websites: TechCrunch, NYDailNews.com, The Huffington Post,
   b. Social networks: Facebook, Twitter, Instagram,
   c. Searching engines: Google, Yahoo, Bing and some field-specific engines, such as Skyscanner, Aviasales, Tripadvisor,

2) The subscription model: companies sell a service contract with recurring fees that automatically continues. The present research will only consider companies which provide users with either the free limited access to its resources or the full access to its functions in exchange for the monetary payment (see section 4.3.1). The relevant examples are Dropbox, LinkedIn, Spotify and many other health and sport-related applications.

3) Data licencing model: companies licensing the right to use and analyse their users' data to the third parties. This business strategy is applied, e.g. by Twitter[13].

Besides, many platforms rely on the commission model: they receive a fee for every completed sales transaction, as, e.g. Booking.com. This type of companies also collects and uses the personal data of its users, nevertheless, their example is not illustrative for the present thesis and, thus, will not be considered.

1.3. Purpose

The present thesis aims to analyse the possibility of the VAT application to the supply of services by the online platforms to users when no monetary

[10] See e.g. :S. Pfeiffer (2016). "VAT on 'free' electronic services?", International VAT Monitor; C. Langhanke, M. Schmidt-Kessel (2015). "Consumer Data as Consideration", Journal of Europ. Consumer and Market Law

[11] The "sharing economy" (peer-to-peer) platforms will not be considered.

[12] Schlie, E., Rheinboldt, J. and Waesche, N.M. (2011). "Simply Seven: Seven ways to create a sustainable Internet business", Palgrave Macmillan, Basingstoke, New York cited by K. Täuscher (2016), pg. 19

[13] BBC News, 7.11. 2013. "How does Twitter make money" (by Pia Gadkari)

consideration is involved. With this regard, the following legal questions should be answered:

1. Can personal data serve as a consideration for VAT purposes, when the user gets "free" access to the platform after submitting an obligatory registration form or accepting the cookies policy? Should this B2C interaction be regarded as a barter transaction?
2. Is there a taxable transaction for VAT application in the circumstances defined in section 3.1 as the model relationships?
3. What are the practical implications and potential difficulties, assuming such taxable transaction is present and made subject to VAT?

1.4. Method and materials

The present research relies on the traditional legal dogmatic method[14]. The basis for the analysis is the current sources of law, namely the current VAT Directive and relevant secondary EU legislation. Besides, the judicial interpretation of the Court of Justice of the European Union (CJEU) and the opinions of Advocate Generals of the Court (AG) are examined. To comment on the business specifics of the platforms and provide a clear understanding of their commercial reality, the economic and marketing publications are consulted along with the Terms & Conditions and Privacy Statement of examined real-life companies.

1.5. Delimitation

Firstly, this thesis does not include the analysis of the platforms facilitating distance sales of goods or B2C imports of goods, as well as the companies acting in their own name, but on behalf of the service providers ("deeming provisions"). Secondly, the in-depth examination of the B2B relationships between the platforms and advertisers (or other third parties) falls outside of the scope of the present paper; it focusses only on the platform's interaction with users – private individuals. Thirdly, while present research generally leaves out of scope the companies, which function exclusively on a paid basis, section 4.3.1 will specifically analyse those of them that provide both paid and limited free-of-charge access. Lastly, the protection of personal data will be touched upon without, however, detailed consideration.

1.6. Outline

Following the Introduction, Chapter 2 describes the relevant fundamental elements of the EU VAT legislation, such as the status of a taxable person and the concept of supply for consideration. The relevant CJEU case law supports the

[14] Sjoerd Douma (2014) "*Legal Research in International and EU Tax Law*"(Kluwer 2014), pg. 17

analysis in this section. Further, Chapter 3 presents the examination of the hypothesis that there is a supply of e-services by platforms in exchange for consideration in the form of personal data. For this purpose, the model relationships are defined and used for the application of the relevant VAT requirements. Chapter 4 discusses the results of the conducted examination, as well as suggests some criticism and alternative approaches to the legal interpretation of the factual circumstances in question.

2. Relevant provisions of the VAT Directive

2.1. Taxable person

According to Article 2 of the VAT Directive, a taxable transaction should be performed by a taxable person acting as such. The taxable person is defined as "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity will be".[15] This status was elaborated specifically for VAT purposes and must be given "an autonomous and uniform interpretation throughout the European Union".[16] The extensive CJEU case law regarding the elements of the taxable person status provides helpful guidelines for better understanding of the concept.

Firstly, the VAT aims to tax expenditures made by private persons[17], therefore, the taxable person status is designed to distinguish between those, who enjoy a right of deduction, and final consumers bearing the full burden on the tax. The definition refers to "any person", which allows it to cover natural and legal persons, both public and private, corporations and entities devoid of legal personality.[18] The treatment of the person under the national civil law or for direct taxation purposes is irrelevant[19]. Besides, the VAT system requires an entity to "act as a single unit".[20] For instance, the partnerships, which might be transparent for direct taxation, shall be regarded and registered as one taxable person for VAT purposes.

Secondly, the art. 9 of the VAT Directive puts significant focus on the criterion of independence. In the pursuit of an economic activity, a person should not be in employer-employee relationships as regards working conditions, remuneration and the employer's liability. Persons should act on their own account and their

[15] Art. 9 (1), first paragraph VAT-D

[16] C. Trenta (2013). "*VAT in peer-to-peer content distribution: towards a tax proposal for decentralised networks*", (JIBS Dissertation Series No. 90 2013), pg. 83; Case C-276/14 *Gmina Wrocław*, para. 25-26

[17] Ben Terra, Julie Kajus,(2018). "*A Guide to the European VAT Directives 2018*", 7.1.2 Tax on consumption

[18] Case C-276/14 *Gmina Wrocław* , para. 28

[19] Ben Terra, Julie Kajus,(2018) (n.16), 9.1.1 Any person in any place

[20] Ibid

own responsibility.[21] The certain limits, imposed by the national law, as in case of notaries and bailiffs activities (*Commission v Kingdom of the Netherlands*[22]), or the disciplinary control by an authority (*Ayuntamiento de Sevilla*[23]) are not decisive factors for the independence test. Moreover, the Court emphasised that a taxable person must "bear the economic risks arising from its business"[24]: have an endowment capital[25], generate its own earnings and bear of the costs of that activity.

2.2. Economic activity as an element of the taxable person's status

The core element of the status is the performance of economic activity. This notion is broad enough to encompass "all stages of production, distribution and the provision of services"[26] or goods. The VAT Directive defines economic activity as "any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions".[27] Following the general description, there is a particular example of economic activity – "the exploitation of tangible or intangible property for the purposes of obtaining income on a continuing basis"[28]. The term "exploitation" stresses the importance of an objective nature of VAT rules: due to the principle of neutrality, this term covers any activity of a person, whatever their legal form may be.[29]

To qualify as a taxable person, a company should at least declare an intention to commence an economic activity, supported by objective evidence if needed.[30] Thus, the fact that the taxable person performs only preparatory acts and does not generate income so far does not affect his status. It follows that the primary goal of a taxable person is to receive an income at some point in the future: "the economic activity of a taxable person [...] are necessarily activities which are carried on with the object of obtaining payment of consideration".[31] Nevertheless, there is no general requirement for a person to be profitable[32]: the financial results are irrelevant for the VAT status of a company, as far as it relies on commercial considerations.

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[21] Case 235/85 *Commission v Kingdom of the Netherlands*, para. 14
[22] Ibid
[23] Case C-202/90 *Ayuntamiento de Sevilla*, para. 12
[24] Case C-210/04 *FCE Bank*., para. 35; Case C-276/14 *Gmina Wroclaw*, para. 34
[25] Case C-210/04 *FCE Bank*., para. 37
[26] Case 235/85 *Commission v Netherlands* para. 7; Case C-186/89 *W. M. van Tiem*, para. 17;
[27] Art. 9 (1) second para., first sent., VAT-D
[28] Art. 9 (1), second para., second sent., VAT-D
[29] Case C-186/89 *W. M. van Tiem*, para. 18; Case C-369/04 *Hutchison 3G UK Ltd and Others,* para. 32, Case C-25/03 *HE*, para. 39; Case C-263/15 *Lajvér*, para. 24;
[30] Case 268/83 *Rompelman*, para. 24; Case C-110/94 *INZO*, para. 24
[31] Case 89/81 *Hong-Kong Trade Development Council*, para. 11
[32] Case C-263/15 *Lajvér*, para. 35

While the presence of an income is necessary, the receipt of some payment for transactions does not, per se, mean that a given activity is economic. The CJEU concluded that the nominal or inadequate level of the consideration might indicate the lack of the economic activity as such. This is the case, for instance, when the company is in persistent losses[33], the price paid by the consumer does not correspond to the value of the services provided, depends entirely on external factors[34], or the payment is present, but an amount is negligible[35].

The economic activity, contrary to the private use of assets, presupposes some regularity, generation of an income on continuing basis. Although the literal interpretation of art. 9(1) of the VAT Directive may lead to the conclusion that "continuity" is required only in relation to a particular example of an economic activity, this factor is a necessary prerequisite for any activity to be regarded as economic one for VAT purposes. As AG General Van Gerven stressed in *Van Tiem,* while only the Second VAT Directive explicitly referred to the necessity of regular basis of the economic activity[36], "the requirement continues to be of general application".[37] The Court endorsed this position in the later cases[38]. Moreover, as this requirement relates to the process of income generation[39], the CJEU in the number of cases specified that the frequency or actual number and scale of the transactions[40] does not influence the conclusion about the nature of the activity. Instead, other factual circumstances indicate that the activity does not fall within the sphere of the private interests of a person[41], is governed by commercial considerations and generates turnover during a specified period[42].

Although some scholars claim that the there is no precise definition separating an occasional activity from the one carried out on a stable basis[43], the "continuity" requirement is still a necessary element of the taxable person status. Another supporting argument relies on the interpretation of art. 12, which allows MS to treat as a taxable person anyone who occasionally carries out a transaction referred to in the second subpara. of art. 9(1).[44] This provision "would be superfluous, if the first paragraph already applied to economic activities carried on an occasional basis".[45] Nevertheless, art. 12 refers only to persons who are not yet

[33] Case C-267/08 Opinion of Mr Advocate General Poiares Maduro, *SPÖ,* para.14
[34] Case C-246/08 *Commission v Republic of Finland*
[35] Case 50/87 *Commission v French Republic*
[36] Art. 4, Second Council Directive 67/228/EEC: "independently and habitually engaged in the transaction"
[37] Case C-186/89 Opinion of Mr Advocate General Van Gerven, *W. M. van Tiem* para. 12
[38] Case 235/85 *Commission v Kingdom of the Netherlands*; Case C-25/03 *HE*
[39] Case C-62/12 Opinion of Mr Advocate General Wathelet, *Galin Kostov* para. 39
[40] Joined cases C-180/10 and C-181/10 *Słaby and Others*, para. 37-38
[41]Case C-62/12 Opinion of Mr Advocate General Wathelet, *Galin Kostov* para. 53
[42] Case C-186/89 *W. M. van Tiem*, para. 18; Joined cases C-180/10 and C-181/10 *Słaby and Others*, para. 51
[43] C. Trenta (2013), pg. 103
[44] See the changes in art. 12 in the European Commission Proposal COM(2018) 329 final, 25.5.2018
[45] Case C-186/89, Opinion of Mr Advocate General Van Gerven, *W. M. van Tiem,* para. 12

taxable persons. If the person already has the status with regard to any activity, this taxable person is subject to VAT for all his economic activities – both usual and occasional one - unless they fall within the sphere of his private activities.[46]

To sum up, the receipt of the taxable person status requires some permanent, economical by nature activity, by which a taxable person aims to obtain an income on continuing basis.

2.3. Taxable transactions

The EU system relies on the dichotomy of goods versus services.[47] Under the art. 14(1) of the VAT Directive, the supply of goods means "the transfer of the right to dispose of tangible property as owner". All the rest fall under the definition of the supply of services (art. 24(1)). The CJEU stressed the importance of an autonomous interpretation of these concepts.[48]

Besides, the VAT Directive refers explicitly to "electronically supplied services" or "electronic services" as a sub-category of the services in general. This group is separately recognised for the application the special rules regarding the place of supply for B2C transactions (art. 58 VAT-D). Moreover, the taxable persons not established within the EU, when supplying telecommunications services, broadcasting services or electronic services to non-taxable persons, have right to use the special scheme provided in art. 359 ("Mini One-Stop-Shop", MOSS).

It is notable that the VAT Directive does not explicitly define e-services, except for the examples in the non-exhaustive list in Annex 2. The Implementing Regulation 282/2011 describes electronic services as including "services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology"(art.7). [49] As well as the VAT Directive, the Regulation provides rather more extended, but still a non-exhaustive list of electronically supplied services, including Annex 1, which specifies the services referred to in Annex 2 of the VAT Directive.

To sum up, the EU legislation was the first one in the world to distinguish "electronically supplied services" as a sub-category in the VAT legislation, which

[46] Ibid, para. 41

[47] F. Cannas "The new Models of the Digital Economy and New Challenges for VAT Systems", in M. Lang and Ine Lejeune (eds.), "*VAT/GST in a Global Digital Economy*" (Kluwer 2015), pg. 10

[48] For the definition of the supply of goods, see C-320/88 *SAFE*, para. 7, Case C-25/03 *HE*, para. 6. For the definition of the supply of services – Case C-268/99 *Aldona Malgorzata Jany and Others*, para. 48

[49] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax

allows an application of the specific rules regarding the place of supply, assessment, collection, rate and tax liability rules. However, other requirements, which generally applies in the VAT system, stays the same for e-services as well.

2.4. Essential characteristics of consideration and taxable amount

For a supply to be subject to VAT, it should be performed for a consideration (art. 2(1)VAT-D). While the receipt of income is an integral part of an economic activity and the status of a taxable person, "the existence of consideration is made a prerequisite for the application of VAT to a specific transaction"[50].

The current VAT Directive does not contain a definition of a consideration[51], but it is mentioned within the definition of taxable amount (art. 73). As regarding many other elements of the common VAT system, the Court stated that this notion "does not refer to the law of the Member States for the determining of its meaning and its scope […] and may not be left to the discretion of each Member state".[52] In the numerous cases, the CJEU took an opportunity to formulate the essential characteristics of the consideration.

To begin with, the consideration should be stipulated in advance[53], with the sufficient degree of certainty. An "unascertained reduction in the value of the shares possessed by the members of the cooperative" [54], for example, cannot be regarded as payment for the service, while a specific deduction from the employee's cash remuneration can qualify as a consideration[55]. Even in the circumstances, when the consideration constitutes a lump-sum payment, which does not initially indicate any personalised supply, the amount due should still be "determined in advance on the basis of well-established criteria"[56].

As for the level of the consideration, there is no any certain minimum threshold for proper consideration.[57] Due to the concept of the subjective value recognised in the VAT system[58], the actual price does not have to correspond the value assessed according to objective criteria[59]. The Court supposed with position by stating in *Hotel Scandic Gåsabäck* that for the transaction to be regarded as effected for consideration it is irrelevant whether "the price paid for an economic

[50] Case C-267/08 Opinion of Mr Advocate General Poiares Maduro, *SPÖ,* para. 10
[51] Cristina Trenta (2013), pg. 283; It is one of the few terms that lacks an EU definition', (11.2.4)
[52] Case 154/80 *Coöperatieve Aardappelenbewaarplaats*, para. 9
[53] Case C-246/08 *Commission v Republic of Finland*, para. 43
[54] Case 154/80 *Coöperatieve Aardappelenbewaarplaats*, para. 12
[55] Case C-40/09, *Astra Zeneca UK Ltd*, para. 35
[56] Case C-151/13 *Le Rayon d'Or SARL*, para. 36-37
[57] Cristina Trenta (2013), pg. 315
[58] Ben Terra, Julie Kajus,(2018), 13.2 Supplies of services or goods
[59] Case 154/80 *Coöperatieve Aardappelenbewaarplaats*, para. 13

transaction is higher or lower than the cost price"[60]. However, another decision, at first sight, seems to contradict this approach. In *Commission vs the French Republic*, the CJEU did not accept the level of the consideration and concluded that "because of the amount of the rent, the lease must […] be regarded as involving a concession and not as constituting an economic activity"[61]. Nevertheless, the approach of the Court in these two cases is consistent, since it illustrates the primary importance of the presence of an economic activity as such.[62] In *Commission vs the French Republic*, the amount of remuneration received indicates the lack of supplier's intention to get an equivalent return; the payment is a just negligible contribution to the costs. On the contrary, if the supply carried out within a commercial activity, the taxable transaction is present, even if the consideration is nominal or lower then costs.

Besides, the consideration is essential for VAT purposes not only as an element of a taxable transaction but also as a base for a calculation of the VAT due. It is linked to the determination of a taxable amount[63], which is defined in the VAT Directive as including "everything which constitutes consideration obtained or to be obtained by the supplier […] from the customer or a third party, including subsidies directly linked to the price"(art. 73 VAT-D). While this definition relies on the subjective value, other methods of calculations, such as the open market value, the purchase price or cost price and the full costs of the taxable person are to be applied only in the special circumstances, referred to in art. 80, 16 and 26 accordingly.

Moreover, as for the source of the consideration, the VAT Directive does not require it to be obtained directly from the person to whom the supply was made.[64] The payment is made by the third party under art. 73 VAT-D when "a portion of the consideration […] was made available on behalf of the final consumer by a third party not connected with that transaction"[65]. Although at first sight, this seems to contradict the direct link requirement, the Court explicitly stated in *Le Rayon d'Or SARL* that "the fact that, […], the direct beneficiary of the services in question is not the national sickness insurance fund which pays the lump sum but the insured person is not, […], such as to break the direct link between the supply of services made and the consideration received."[66]

[60] Case C-412/03 *Hotel Scandic Gåsabäck*, para. 22
[61] Case 50/87 *Commission v French Republic*, para. 21
[62] Cristina Trenta (2013), pg. 317
[63] Ibid, pg. 288
[64] Joined Cases C-53/09 (*Loyatly Management*) and C-55/09 (*Baxi*), para. 56
[65] Case C-398/99 *Yorkshire Co-operatives Ltd*, para. 18
[66] Case C‑151/13 *Le Rayon d'Or SARL*, para. 35. Also, see Ben Terra, Julie Kajus,(2018), 13.2.3.2 for "Redrow principle"

2.5. Consideration in kind: barter transactions

For VAT purposes, the consideration can be provided either in monetary form or kind. When no monetary payment is involved, a barter transaction takes place. For instance, a company and individuals may engage in this type of trade as a part of promotion schemes, which are often organised by retailers to attract customers or upraise the sales.

In the Court's point of view, both forms of consideration are economically and commercially speaking identical, and the VAT Directive treats them in the same way.[67] While it is possible for consideration to take the form of goods (*Orfey Balgaria*)[68], the cases examined by the CJEU concerned mostly the supply of goods in exchange for the services provided by individuals. The following services represented the consideration in kind: the services of the arranging a gathering, at which the goods of the wholesaler can be sold by the retailer (*Naturally Yours Cosmetics[69]*) or the service of the introduction of a new customer (*Empire Stores Ltd*, *Bertelsmann[70]*). Furthermore, the Court implicitly accepted the possible scenario, when there are two corresponding supplies performed by taxable persons. In such case, each supply, at the same time, constitutes consideration for another one. This conclusion follows from the Court's reasoning in *Orfey Balgaria:* "in order to determine whether the conditions for chargeability of the VAT owing on such a future supply of services are satisfied, it does not matter whether the consideration for that future supply of services itself constitutes a transaction which is subject to VAT".[71] Nevertheless, this situation was not examined in details, since most of the cases considered the last stage of the supply chain, where the final consumer paid for the goods with non-monetary consideration.

The central requirements for the consideration in kind is that it "must be capable of being expressed in monetary terms"[72]. The Court did not clarify this condition in general terms but examined each case based on its specific factual circumstances. Thus, it is unclear whether any consideration may, in theory, be *not* capable of being expressed in monetary terms.

Moreover, this requirement is necessarily linked to the methods how to determine the value of the consideration, taxable amount for VAT purposes. As for the first

[67] Case C-330/95 *Goldsmiths (Jewellers) Ltd*, para. 23; Case C-549/11 Orfey Balgaria, para.35

[68]See also D. Butler, (2002). "The VAT treatment of goods as non-monetary consideration: the approach taken by courts in the United Kingdom in the light of the general principles established by the European Court of Justice", 11 EC Tax Review

[69] Case 230/87 *Naturally Yours Cosmetics Limited*

[70] Case C-33/93 *Empire Stores Ltd;* Case C-380/99 *Bertelsmann*

[71] Case C-549/11 *Orfey Balgaria,* para. 39,

[72] Case 230/87 *Naturally Yours Cosmetics Limited*, para. 16; Case C-33/93 *Empire Stores Ltd*, para. 17

time specified in *Naturally Yours Cosmetics*, the valuation of non-monetary consideration relies on the subjective value concept[73], which is the general for the VAT system. Furthermore, from the theoretical point of view, the basis of assessment should be the value, which a private person attaches to the supply since it is his expenditures, which are taxed[74]. In case of barter, the Court concluded in *Empire Stores* that the value, which the recipient of the consideration attributes to it, should be considered. The taxable amount must correspond to the amount which the supplier is prepared to spend to get the consideration in kind[75]. Noteworthy, in the earlier case *Naturally Yours Cosmetics* the Court took into account the "monetary value which the two parties to the contract attributed to that service"[76], referring to the agreed position of both parties.

The CJEU approach in both *Empire Stores* and *Naturally Yours Cosmetics*, nevertheless, seem to be based on practical aspects of the cases decided. In the circumstances in question, it was more convenient to calculate the taxable amount based on the value of the goods supplied in exchange for services, since either the wholesale price (*Naturally Yours Cosmetics*) or the price, paid by the supplier himself for those goods (*Empire Stores*) were already established. This leads to an inevitable question: how the value will be calculated in case of "services-for-services" barter transaction or when there is no retail price to be taken as a base of evaluation? B. Terra and J. Kajus suppose that when the supply of services is involved, the value can only be equal the cost price, which the supplier incurred for those services.[77] The CJEU position in *Bertelsmann* that all expenses borne by the supplier, including incidental services, such as costs of delivery[78] constituted the taxable amount for the barter transaction, supports this approach. However, it may be practically difficult to calculate the costs for the services, which the company has never provided on a paid basis.

To conclude, the CJEU treatment of the non-monetary consideration seems to rely on case-by-case analysis and does not provide the general solutions as for the method of valuation of the taxable amount.

[73] Case 230/87 *Naturally Yours Cosmetics Limited*, para. 16; C-549/11 *Orfey Balgaria*, para. 4
[74] Ben Terra, Julie Kajus,(2018), 13.2.1 Barter Transactions
[75] Case C-33/93 *Empire Stores Ltd*, para. 19,
[76] Case 230/87 *Naturally Yours Cosmetics Limited*, para. 17
[77] Ben Terra, Julie Kajus,(2018), 13.2.2. Promotion schemes, pg. 347
[78] Case C-380/99 *Bertelsmann*, para. 24

2.6. Direct link requirement

For a transaction to be subject to VAT, the goods or services provided should be directly linked to the considerations received.[79] If no such link is present, a mere payment without an economic transaction will not be treated as consideration[80], as well as the transaction with no corresponding consideration, as a rule, falls outside of the scope of the VAT.[81] For the present research, it is important to note that the direct link requirement is relevant for the taxable transactions with both monetary consideration and the one in kind.[82]

The VAT Directive neither explicitly mentions nor contains a definition of this concept. The direct link test emerged from the CJEU's interpretation of art. 2(1) and art. 73 VAT-D.[83] The first time an obligatory presence of a "direct link between the service provided and the consideration received" was mentioned by the Court in *Coöperatieve Aardappelenbewaarplaats*[84]. Until the uniform concept of the direct link was formulated, the Court mostly pointed out the different features of this link or provided some indications of its presence. For instance, in *Apple and Pear Development Council* it was concluded that the direct link is missing if the mandatory charges or fees are recoverable regardless whether or not a given service confers a benefit upon an individual.[85] Moreover, to satisfy the requirements, the level of the benefits obtained by an individual shall correspond to the amount of the mandatory charges paid.[86] This reasoning, however, does not seem to be applicable in the circumstances such as in *Kennemer Golf & Country Club.* When the supply comprises access to some resources on a permanent basis, but not particular services provided at the request[87], it is hard to estimate the benefits personally consumed.

The CJEU provided further significant development of the concept of the direct link in the famous *Tolsma* case. The Court stated that the direct link is present when there is "a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient".[88] Hence, the Court stressed the importance of the agreement, active involvement, and awareness of both parties. Even if one party does something with a view to collecting money or receiving

[79] Joined Cases C-53/09 (*Loyalty Management*) and C-55/09 (*Baxi*), para. 51
[80] Cristina Trenta (2013), pg. 292
[81] Exception under article. 16 and article. 26 VAT-D
[82] Case 230/87 *Naturally Yours Cosmetics Limited*, para. 11
[83] Case C-11/15 *Český rozhlas*, para. 22
[84] Case 154/80 *Coöperatieve Aardappelenbewaarplaat*, para. 12,
[85] Case 102/86 *Apple and Pear Development Council*, para. 15
[86] Ibid
[87] Case C-174/00 *Kennemer Golf & Country Club*, para. 40
[88] Case C-16/93 *R. J. Tolsma*, para. 14

income[89], another party should be obliged to pay for a service with a stipulated consideration. This approach excludes uncertainty within the relationships of the parties, which occurs, when, as in *Tolsma*, the musician can stop playing, or a passenger-by might not give any money.

Besides, it is essential to ascertain whether specific services or goods provided trigger the right of the supplier to claim consideration for it and, thus, causality is present.[90] The *Český rozhlas* provides an excellent example of how services or goods and the payment can be mistakenly linked to each other. In this case, the Court ruled there was not taxable supply since the obligation to pay a fee was linked not to the use of the public broadcasting service, but solely to the possession of a radio receiver.[91] Following this approach, some scholars claim that the double examination should be conducted: both the direct link between service and consideration and the causal relationship between these two actions should be established.[92]

The Court in several cases clarified the meaning of elements of the direct link as it defined in *Tolsma*. For instance, the possible difficulties with the application of the "legal relationships" element were touched upon in *Posnania Investment*. On the one hand, AG Kokott believed that although the direct link presupposes proper bilateral legal relationships, "the relevant feature is the reciprocity between the expenditure and the consumable benefit and not the reciprocity of the basis in civil or public law".[93] Therefore, even if the transaction between the public entity and a private person is governed by public law, it should not affect the presence of the direct link.[94] On the other hand, the Court disagreed with this position and stated that when the relationship concerns a public duty of a taxable person, namely the payment of tax debt, the relationships between a creditor, and its debtor are unilateral in nature[95], regardless the form of the payment. Since it "does not result in any performance on the part of the public authority", there is no necessary reciprocal performance, which triggers the breach of the direct link.[96]

Furthermore, the Court did not clarify when "the remuneration received constitute the value actually given in return for the service supplied". Some scholars suggest that the direct link test was intended only to identify the consideration, while the

[89] Ibid, para. 18
[90] Cristina Trenta (2013), pg. 293.
[91] Case C-11/15 *Český rozhlas*, para. 25
[92] Cristina Trenta (2013), pg. 294
[93] Case C-36/16 Opinion of Advocate General Kokott, *Posnania Investment*, para. 19
[94] Ibid, para. 19
[95] Ibid, para. 33
[96] Ibid, para. 34, 36

subjective value test aims to value it.[97] Thus, these two categories should be separated.

To conclude, for a transaction to be subject to VAT, the benefit acquired by a consumer should be directly linked to the considerations paid by him or the third party.

3. Analysis of possible VAT taxation of the provision of access to online platforms in exchange for personal data

3.1. Description of the model relationships

As described in the Introduction, this research focuses on the scenario, when a user does not pay for access to a website and the website, in its turn, collects and uses personal data for commercial purposes. The central question is whether in such circumstances the provision of online access in exchange for a consideration in the form of personal data can be subject to VAT. To apply the relevant VAT rules and answer this question, it is necessary to define the model relationships. These relationships represent a generalised model of interaction between a website, users and third parties (advertisers) and form a basis for the analysis. Although each platform business has its economic and legal specifics, this model relationships are valid for the present research, as it encompasses their essential common features. Those might be summarised as follows:

1. Even if legal persons can be users of the website via their representatives, for the present analysis only private persons accessing a website will be considered. As a result, B2B relationships of the platforms with third parties, e.g. advertisers, can be clearly distinguished from its interaction with users. Besides, it should be assumed that the users reside within EU since it predetermines the place of supply and the application of the European VAT in the first place.
2. The users provide their personal data to a platform prior accessing to its online resource. It can be done via an obligatory registration, which leads to a creation of one's profile on the website or by allowing transfer of one's profile at another website. Alternatively, when no registration is needed, the personal information, including the history of one's search and activity at a particular website, can be collected by the platform via the cookies technology[98]. A user receives a note stating that the website applies this technology and that one has to

[97] D. Butler (2004). "The usefulness of the `direct link' test in determining consideration for VAT purposes", 13 EC Tax Review, pg. 8

[98] The cookies are small text files (up to 4KB) created by a website that is stored in the user's computer either temporarily for that session only or permanently on the hard disk (persistent cookie). Cookies provide a way for the website to recognize you and keep track of your preferences. ("PC Encyclopedia",website).

abstain from using its resources, if not accepting this policy. The platform uses collected personal data for commercial purposes: it might analyse it and apply the results for its advertising system (segmentation of the market and placing targeted advertisement) or license users' data to the third parties[99]. For any business model the usage of personal data and, ultimately, the big data[100] constitutes a prerequisite of the company's success.

3. The platform within its B2C interaction acts as a service provider. Section 3.4 will further analyse the content and the classification of these services from a VAT perspective. In any case, there is no physical goods or offline services provided by the examined companies.

3.2. Order of application of the relevant VAT rules

The present analysis will be conducted with the use of the deductive method of reasoning, meaning that the relevant VAT rules, as they are defined in the VAT Directive and interpreted by the CJEU, will be applied to the model relationships. The CJEU case law provides an order, in which the elements of the VAT system should be applied to a particular situation. Specifically, the Court usually, first, establishes the taxable person's status, mainly, by the presence of an economic activity, then, classifies the type of transaction for VAT purposes, and, finally, analysis the consideration element and direct link requirement.[101] The nature of the VAT system justifies this approach since the conclusions at every step of the analysis determine the rules which are applicable next. That is also relevant for the present research: the consideration in every section of this Chapter will affect the following analysis.

3.3. Online platforms as taxable persons

As established in section 2.1, only the person, who qualifies as a taxable person, is eligible to perform a supply from a VAT perspective. Therefore, it is necessary to identify whether at least one of parties involved in the model relationships has this status.

In the model relationships, there is, on the one side, the personal data provided by a user and, on the other side, the services supplied by the platform. Therefore, this transaction constitutes barter. From a VAT perspective, there are two possible scenarios: one supply may correspond to the consideration in kind, or two supplies might take place, meaning that each of them represents the consideration

[99] BBC News, 'How does Twitter make money?' by Pia Gadkari, 7.10.2013

[100] Big data is 'high volume, velocity and variety information assets that demand cost-effective, innovative forms of information processing for enhanced insight and decision making'(Beyer, M.A. & Laney, D. (2012). "The Importance of 'Big Data': A Definition", Gartner Publications)

[101] See e.g. Joined Cases C-53/09 (Loyalty Management) and C-55/09 (Baxi), para. 40, 50-51

for one another. For this reason, it should be examined, whether a platform is a taxable person and whether a user, supplying his personal data, qualifies as a taxable person. S. Pfeiffer examined the latter question from both theoretical and practical perspectives and concluded that the provision of personal data for access to online platform does not constitute an economic activity. [102] Based on this position, it will be assumed that the users are non-taxable persons, and an in-depth examination of this question will be left outside of the present thesis.

All elements of the taxable person definition (art. 9(1) VAT-D), as analysed in the sections 2.1 and 2.2, shall be applied to the platform within the model relationships. To begin with, as far as "any person" can qualify as a taxable person, the form of incorporation of the platform under foreign national law or its treatment for the direct taxation purposes is irrelevant. Furthermore, as for the criterion of independence, the case of online platforms is not significantly different from other conventional service providers. The same set of conditions should be applied to assess whether the person acts independently, on its own account, its own responsibility, as well as bears the economic risks. The companies presented in section 1.2 satisfy these requirements, since the provision of services represents their own economic activity, resulting for them in profits or losses.[103]

The central element of the taxable person status is an economic activity. Sections 1.1-1.2 examined the specifics of the platform-based business model, which leaves no doubt that the relevant companies carry out an activity with the objective to generate an income. The digital economy becomes more and more important part of the global economy.[104] Therefore, one can hardly argue that these companies pursue goals other than commercial ones. Their activity is not exclusively based on the supply of access to its websites for free, so they shall be regarded as economic actors. However, their model of revenue generation is not the same as for the conventional businesses: the expenses on a "free" supply to users are offset with income generated from their relationships with business clients, such as advertisers and data analytics agencies.

Besides, to qualify as a taxable person, a company or individual should obtain an income on continuing basis. In case of the platforms, their economic activity is not occasional or of non-regular nature. In particular, the platforms' B2B relationships represent the long and complicated process, which starts from attracting the users, collecting and analysing their personal data and ends with selling to advertisers banner-places or access to users' information

[102] See, e.g. S. Pfeiffer (2016), section 2.3. Relation between recipient and service provider

[103] The online websites (platforms) acting on behalf of the service providers fall outside of the scope of the present research.

[104] World Investment Report 2017, Chapter 4: "Investment and The Digital Economy", UNCTAD, United Nations

Altogether, the factual circumstances indicate that the platform in the model relationship can qualify as a taxable person, at least, in relation to its B2B economic activities. As for its interaction with the users, it is premature to decide on the nature of this activity prior analysing the possibility to treat personal data as consideration for VAT purpose. Nonetheless, as it was established (see section 2.2) if the status is obtained, the taxable person shall be treated as such in relation to all his activities – both major and occasional one.[105] The only limitation is that such transactions should not fall within the sphere of his private activities. With the sufficient degree of certainty, it can be concluded that the personal data of users is not used by the company for non-commercial purposes.

To conclude, the digital platforms qualify as taxable persons, since, at least, their B2B relationships with either advertisers or other business clients have commercial nature.

3.4. Classification of online platforms' activities according to the VAT Directive

The model relationships do not involve the transfer of any tangible goods. Therefore, the platform acts as a service provider. To apply VAT, the nature of these services should be analysed. The classification of the services affects the applicable provisions in respect to the place of supply, assessment, collection, rate and tax liability rules.

The VAT Directive distinguishes explicitly electronically supplied services or electronic services (art.58 VAT-D). Article 7 of the Implementing Regulation 282/2011 defines them as: (1) delivered over the Internet, (2) essentially automated, (3) involving no minimal human intervention, and (4) impossible to ensure in the absence of information technology. The functioning of the companies relevant to the present thesis certainly satisfies those requirements. The B2C interactions of the platforms, examined in section 1.2, can be classified in accordance with Annex 2 of the VAT Directive and the Implementing Regulation (art. 7 and Annex 1) as follows:

1. The searching engines (the general one, such as Google, Firefox, Bing and the field-specific–Skyscanner, Lexis Nexis, Google Scholar) perform "services automatically generated from a computer via the Internet […], in response to specific data input by the recipient" (art. 7(2)(c)). Regarding the supply of images, text, information and databases (Annex 2, p.1,) their services are explicitly specified as the "use of search engines and Internet directories" (Annex 1, p. 3(i))
2. All platforms releasing their mobile applications, such as social networks (Facebook, Linkedin), sport and health-related applications (Fitbit, NHS Choices

[105] Case C-62/12 *Galin Kostov*, para. 31

Drinks Tracker, Sleep Cycle) perform "supply of software and updating thereof" (Annex 2, p.2).

3. The news websites and other media resources (Google news, BBC news) supply "the digitised content of books and other electronic publications" or provide "subscription to online newspapers and journals"(Annex 1, p.3(c), (d), (f))

4. The advanced users of the social networks, such as Twitter and Instagram benefit from available "weblogs and website statistics"(Annex 1, p.3(e)).

5. The companies, such as Spotify, SoundCloud, Youtube, allow users "accessing or downloading of music on to computers and mobile phones" (Annex 1, p.4(a))

Thus, the provision of access to their websites by analysed platforms falls within the category of e-services. Noteworthy, the real-life examples show how it is common for the e-services listed in the VAT Directive and the Implementing Regulation to be provided to users free of charge. Even if in some cases the payment of the fixed price or subscription fee is required, the websites usually allow the limited access to its resources free of charge.[106] This trend makes the present analysis even more important for the proper application and future development of the VAT system.

3.5. Treatment of personal data as consideration for the supply of e-services

The analysis so far showed that within the model relationships: a platform can qualify as a taxable person for VAT purposes, and the provision of access to its website is the supply of electronic services. The next step is to establish if there is a consideration linked to this supply, as only in this case the transaction should be subject to VAT.

The CJEU acknowledged that the consideration could take both monetary and non-monetary forms.[107] For the VAT taxation of the barter transaction, it is necessary to establish which party performs the supply and which provides consideration for it. At the same time, barter may potentially involve two corresponding supplies, each of which serves as consideration for one another. This scenario is possible only if both parties qualify as taxable persons. As far as in the model relationships a user is assumed to be a non-taxable person (see section 3.3), only a website performs a supply from a VAT perspective.

As for the users, in the model relationships platforms require them to provide personal data via the registration or transfer of the profile from another website.

[106] Section 1.3.1 will examine this particular scenario from a VAT perspective

[107] Case C-330/95 *Goldsmiths (Jewellers) Ltd*; Case C-549/*11Orfey Balgaria*

Alternatively, they may demand users' consent to the cookies policy.[108] The collection of the personal information usually precedes the access to the online resources. In economic literature, scholars claim that personal data is a new currency of the digital economy.[109] The example of the media platforms, especially news websites, illustrates that many companies replace the "paymentwall" with the "datawall", thus, in principle, allowing users to pay for access with their personal data.[110] Moreover, since the digital companies depend on the usage of big data in their value creation process, the users' personal data represent an important component of the companies' business success.[111] These factors might lead to the conclusion that, from a VAT perspective, a platform performs the supply of e-services in exchange for personal data. To prove this assumption right or wrong, it is necessary to establish whether personal data can, in this case, constitute a consideration.

There are several requirements, related to consideration in general, regardless its form. Namely, it should be stipulated in advance and determined with sufficient degree of certainty.[112] In the model relationship, the registration procedure – the most commonly used method of collection of personal data– takes place before the user can access the platform's resources. At the last stage of this procedure, a user has to read and accept the Terms and Conditions of the website, including the company's Privacy Policy. The Policy explains which personal data will be collected, where it will be stored and how it is intended to be used.[113] By submitting the registration form, the user allows the platform to access the personal information. Alternatively, when accepting the cookies policy (usually by clicking the button "I accept/I acknowledge"[114]), the users explicitly provides the website with a right to use his personal data, track the activity on the website. Even if both types of procedures are required by the regulation of the personal data protection[115], it still can be concluded that the consideration paid for the e-services is determined in advance.

Furthermore, while for a conventional supply an actual price should be predetermined, in a barter transaction the question about the actual content or

[108] Which means to accept that cookies will be stored at the user's device and then recollected by a platform.
[109] T. Evens & K. Van Damme (2016). "Consumers' Willingness to Share Personal Data: Implications for Newspapers Business Models", International Journal on Media Management, pg.11
[110] I. Portilla (2018). "Privacy concerns about information sharing as trade-off for personalized news", El Profesional de la información, v. 27
[111] B. Marr (2016). "*Big Data in Practice: How 45 Successful Companies Used Big Data Analytics to Deliver Extraordinary Results*", John Wiley & Sons, p. 264
[112] Case C-246/08 *Commission v Republic of Finland*, para. 43
[113] For example, Facebook Privacy Policy: https://www.facebook.com/about/privacy/update
[114] LinkedIn starting page: "This website uses cookies to improve service and provide tailored ads. By using this site, you agree to this use. See our Cookie Policy"
[115] The new EU legislation –General Data Protection Regulation (GDPR) – came into force on the 25 May 2018. (L119, 4 May 2016, p. 1–88)

quantity of the data provided may arise. Some scholars suggest that by analogy with the supply of the right to access the website to a user – but not a single one-time e-service –, the platform obtains a consideration in the form of the right to collect and use personal data.[116] This approach allows avoiding an examination of the actual content of the personal information provided and dismiss the need to establish, what exactly was collected and used by a website every time a user access the resource.

Other features of the consideration were pointed out by the CJEU specifically in relation to the barter transactions. To begin with, the consideration in kind should be capable of being expressed in monetary terms.[117] The Court stressed this point in every barter case but did not provide a general clarification of this criterion, as well as has never encountered the cases, where it was not possible to convert the consideration in kind into money. Hence, the relevant case law seems to be incomplete and does not allow to examine whether personal data in the model relationships, by its nature, might *not* satisfy this requirement.

Nevertheless, the method of calculation of the taxable amount in barter cases, accepted by the CJEU, can help to decide on the possibility to express personal data in monetary terms. In the Court's opinion, the subjective value of the supply, in this case, should be determined based on the supplier's point of view.[118] Thus, it is irrelevant how much the user value personal data; the value which the platform attributes to the consideration received should be considered. At first sight, this approach seems favourable for the model relationships, since from an economic perspective the valuation of personal data represents a challenging task.[119] On the other hand, as established in section 2.5, the method suggested by the Court is predetermined, to a large extent, by the factual circumstances of the cases decided. It might not serve a general solution for all potential transactions, especially when the barter involves two corresponding supplies of services, or the supplier has never provided the services in question – e.g. access to websites, such as Google or Facebook – on a paid basis. In principle, the costs incurred by the supplier can be used for the calculation of taxable amount. In respect to the certain platforms, such as Spotify, the free limited usage of the website can be compared with the paid access (see section 4.3.1).

To conclude, while personal data within the model relationships possess the general features of the consideration, the CJEU approach in the existing case law

[116] S. Pfeiffer (2016), pg. 3

[117] Case 230/87 *Naturally Yours Cosmetics Ltd*, para. 16; Case C-33/93 *Empire Stores*, para. 17

[118] Case C-33/93 *Empire Stores* para. 19

[119] Marc van Lieshout (2015). "The Value of Personal Data". In: Jan Camenisch, Simone Fischer-Hubner, Marit Hansen (eds). "*Privacy and Identity Management for the Future Internet in the Age of Globalisation*", p.g2

does not rule out the potential scenario, when the valuation of such consideration in kind would be burdensome or even impossible.

3.6. Application of the direct link test to the model relationships

The consideration in the form of personal data, if accepted as such, should be directly linked to the supply of e-services in question. The CJEU case law, as analysed in section 2.6, highlights the necessary presence of (1) the legal relationship between the service provider and the consumer, (2) the reciprocal performance, and (3) the remuneration, which constitutes the value actually given in return for the service supplied.[120] To decide on the VAT taxation of the transaction within the model relationships, all these elements of the direct link should be examined.

First, there is a specific sort of the legal relationships between a user and a platform, when the former gains access to the online resources of the latter. As a result of the registration procedure or an acceptance of the cookies policy, the relationships of the dual nature come into force. On the one hand, they are governed by public law – namely the regulation of the personal data protection– which requires the consent of the person on the collection and use of his data.[121] On the other hand, there are contractual relationships based on the civil law approach: by introducing the "datawall"[122] at the website, the company demand the provision of user's personal data in exchange for access to its resources.

Secondly, as the CJEU highlighted, the legal relationships in question should lead to the reciprocal performance on both sides. The contractual part of the relationships in question, contrary to the one regulated by the public law, presupposes that there are mutual obligations of both parties, their reciprocal performance towards one another. Thirdly, there is certainly some "value given in return for the services supplied", as far as the platform, being governed by the commercial considerations, accepts the user's personal data instead of the monetary payment.

However, there is one aspect of the relationships in question, which challenge the presence of the direct link. The distinctive feature of any legal relationships is their obligatory nature: each party has a right to require the performance of another party. This means that they cannot unilaterally decide not to perform its obligations. This characteristic seems to be missing in case of the interaction

[120] Case C-16/93 *R. J. Tolsma*

[121] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

[122] The provision of the free access to news content occurs after users have registered and agreed to share personal data with the website, Tom Evens & Kristin Van Damme (2016), p.2

between the platform and the user. On the one hand, while still accessing the website, the user, can avoid the provision of the personal information, e.g. by cleaning the history of search or using the settings of the browser, which reject the cookies. Besides, in case of the registration, a user might provide the false or incomplete information. In almost all these cases[123], the platform has no legal remedy against such improper performance on the part of the user. On the other hand, the platforms itself does not depend much on the users in its operational decisions. For example, if short time after a user created his profile (supplies personal data), the platform stops its activity or changes its functioning to the effect that the user loses access to the essential resources, the latter cannot legally oblige the company to perform its "obligations". The real-life case illustrates, for instance, that a user cannot force the Facebook or Instagram to save some convenient or essential functions if they are lost in the result of the interface updates. All in all, the only situation when the user has a legal remedy against the platform is in the case of breach of the obligations under the personal data protection rules.

This line of reasoning may be regarded as inconsistent with the Court's position in *Town & County Factors*. This case considered the agreement between organisers of competition and the participants, under which the obligations of the suppliers were "binding in honour only". The CJEU decided that the existence of legal relationships within the meaning of *Tolsma* judgement cannot depend on the obligations of the supplier being enforceable.[124] This approach, however, seems to contradict the precise and clear wording in *Tolsma* and all following cases relied on the presence of legal relationships as an indispensable element of the direct link.

Moreover, the situation in *Town & County Factors* is different from the one in the model relationships. Firstly, in the case examined the impossibility of enforcement resulted from the specific clause in the agreement itself, which was interpreted by the Court as "the very expression of a legal relationships" in the *Tolsma* sense[125]. Contrary to this, there is no such waiver of the user's rights in the agreement between the platform and user. Secondly, the Court specifically referred to undesirable consequences for the effectiveness of the VAT Directive, if enforceability was regarded as a necessary prerequisite of the direct link. In such case, the national treatment of obligations under the civil law would affect the uniform VAT taxation.[126] For the model relationships, the lack of legal remedy is same for any national legislation. Thirdly, while in *Town & County*

[123] If the user's browser reject cookies, some websites can stop supporting certain function (however, many websites continue its normal functioning)
[124] Case C-489/99 *Town & County Factors,* para.21
[125] Ibid, para. 23
[126] Ibid, para. 21

Factors the obligations of only one party were unenforceable, for the model relationships both parties have no legal remedy against the improper performance of each other. Lastly, J. Swinkels claim that the principle of the "effectiveness of the legislation" applied by the Court in *Town & County Factors*, constitutes the "forerunner of the doctrine of abuse of law".[127] Taking into account this position, there is no reason to apply such CJEU reasoning to the model relationships, where the interaction between the platform and users, as examined so far, have no evidence of abusive practice.

As a result, the relationships between a platform and a user, with regard to the direct link test, are not much different from those in *Tolsma*. Even if the consideration and the supply are connected to each other by the causal link, the parties may decide on their own, whether to pay the consideration (in personal data) or to perform a supply after the consideration received. This challenges the presence of the direct link and, as a result, a taxable transaction for VAT purposes.

4. Practical difficulties and alternative approaches to the VAT treatment of model relationships

4.1. Purpose of Chapter 4

The analysis so far was based on the hypothesis, that from a VAT perspective, there is a taxable transaction when the platform provides access to its online resources in exchange for personal data. However, this is just one possible interpretation of the relationships between the relevant companies and its customers. The present Chapter aims to illustrate that the examined hypothesis provokes not only theoretical incoherence with the existing VAT system, as established in Chapter 3, but also leads to the practical difficulties for the VAT application. Moreover, the alternative, probably more proper interpretations of the same relationships from a VAT perspective will be presented.

4.2. Summary and discussion of conclusions from Chapter 3

Based on the theoretical analysis, conducted in the previous Chapter, several conclusions should be highlighted.

To begin with, there might be practical difficulties with the expression of personal data in monetary terms. While, as established in section 2.5 and 3.5, the valuation methods provided by the CJEU are not suitable for all possible barter transactions, the calculation of taxable amount in the model relationships might be based on the

[127] J.J.P Swinkels (2006). "Halifax day : abuse of law in European VAT", International VAT Monitor, pg. 6

costs borne by the platform. The economists distinguish the following cost drivers with regard to supply of e-services[128]: the user acquisition & retention (marketing, sales and investments expenses directed at attracting users), the platform infrastructure & development (expenditures on the technological hardware and the development of technological solutions) and the service capacity (the costs related to own and contracted personnel). With due regard to practical reality, it should be acknowledged that the calculation of costs per user might be burdensome. However, in *First National Bank of Chicago* the CJEU stated that "any technical difficulties […] in determining the amount of consideration cannot by themselves justify the conclusion that no consideration exists".[129] It follows that the possible application of the exemption to the transaction in question can be subject to further research.

Moreover, the direct link requirement in case of the supply made by a website to the user raises even more doubts: strictly speaking, the relationships in question miss an essential component – the binding nature. As real-life examples in section 3.6 showed, both parties can unilaterally breach the contractual obligations without any legal consequences.

As a result, while the monetary expression of personal data constitutes more practical or technical issue, the conclusion regarding the direct link challenges the presence of the substantial criteria for the VAT application: the transaction cannot be subject to VAT if the supply and the consideration are not directly linked.

4.3. Alternative interpretations of factual circumstances from a VAT perspective

The functioning of the discussed platform businesses can be differently explained from a VAT perspective. The alternative approaches profoundly rely on the economic specifics of the platforms. Therefore, it is reasonable to discuss it in relation to the examples of particular business models of online platforms.

4.3.1. Case 1: "Freemium/Premium" online platforms

The first example considers a company, which provides a user with two options: the customer can get limited access the platform's services free of charge ("free option", freemium) or decide to pay a subscription fee for the full access ("paid option", premium).[130] The real-life platforms, who use this strategy are Spotify, the writing-enhancement platform Grammarly, Acrobat PDF reader, Skype, media

[128] K. Täuscher (2016). "Business Models in the Digital Economy: An Empirical Study of Digital Marketplaces", Fraunhofer MOEZ, p. 20

[129] Case C-172/96 *First National Bank of Chicago*, para. 31

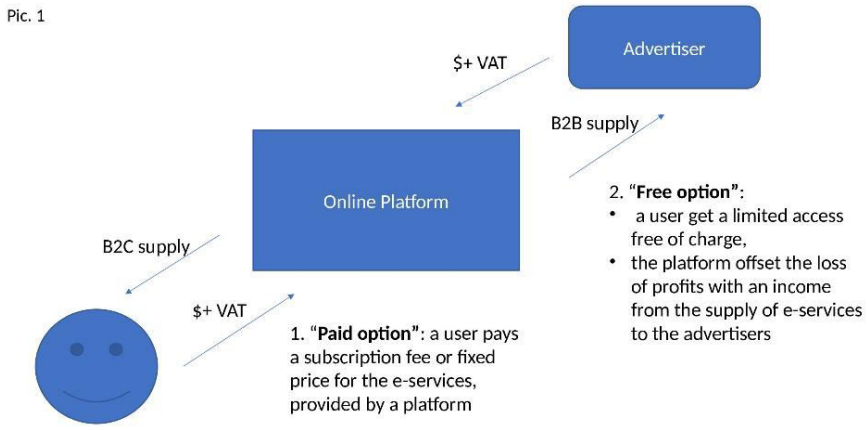
[130] "New business models in the digital age",(A dosdoce.com study sponsored by CEDRO), p. 25

websites, such as Economic, Harvard Business Review, and sport-related applications, e.g. Fitbit. In most of the cases, the practical differences for the free-users will be not only limited access but also the presence of an advertisement.[131] The analysis till this point assumed that the "free access" does not effectively lack the consideration, but the payment is provided in the non-monetary form – personal data. However, there are at least two alternative interpretations of this situation from a VAT perspective.

First approach: two interchangeable sources of revenues for a platform. The "third party payment" assumption

From the economic point of view, the company in question has two possible revenue sources: either the advertisers pay to the platform for the right to display an advertisement[132], or the users directly pay fee for access to the online resources. (see, pic.1). Thus, from the company's perspective, the revenue losses in case of the "free option" are offset with an income received from the advertisers.

Pic. 1



For VAT purposes, it can be concluded that the supply of e-services by the platform to a user is present. However, based on how the company treats its revenue sources, the consideration for this supply might be regarded as paid for by either the user or advertisers. In terms of the VAT Directive, the latter option may be considered a third-party payment, which occurs when a part or the whole consideration is paid by a party not connected to the transaction[133]. However, this reasoning raises the question of the direct link between the supply of e-services to users and the consideration paid.

[131] "Spotify Terms and Conditions of Use" [https://www.spotify.com/uk/legal/end-user-agreement/]: Spotify Free – no ad-free service

[132] This qualifies as a supply of e-services: '(h) the provision of advertising space including banner ads on a website/web page', Annex 1 (3), The Implementing Regulation 282/2011

[133] Case C-398/99 *Yorkshire Co-operatives Ltd*, para. 18

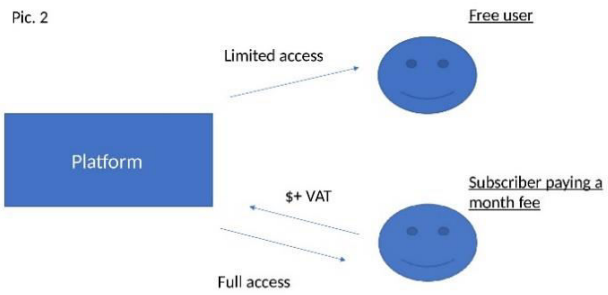
Alternatively, this scenario may be regarded as involving two separate supplies: B2C supply of e-services to the user for the direct payment (in case of the "paid option") or B2B supply of e-services to the advertisers (in case of the "free option"). The fact that the platform may rely on two revenue sources should not result in the confusion of these two different by their nature relationships. There is no single transaction with two sources of payment, but two supplies, each of which is directly linked with its specific consideration. Both two economic activities are subject to VAT in accordance with the applicable law, for this reason, the third-party payment does not take place.

To conclude, in this case, the appropriate VAT taxation is present in both free and paid options. Hence, the treatment of personal data as consideration for VAT application seems redundant.

Second approach: the price for the "paid option" includes the consideration for the free use

Another approach in case of the website, which provides both paid and free access to users, can rely on the fact that most of those businesses have the goal to convert as many of the free subscribers into the paying –"premium"– customers.[134] The limited access helps the company to introduce their service to potential clients, convince them of its usefulness. From a business perspective, the revenues, which the website sacrifices in case of "free use", constitutes the "user acquisition & retention costs". Thus, these costs are included in the retail price paid by other clients for the full access (see pic. 2 below). As a result, the consideration due for the free supply of e-services can be regarded as equally distributed among the "premium" clients: they pay both for their own consumption and the consumption of the free users. In this case, there is no need to additionally levy the VAT on the supply of free e-services since the same portion of the VAT is collected from other, paying customers. Otherwise, the single taxable transaction triggers the double VAT taxation.

Pic. 2



[134]"New business models in the digital age",(A dosdoce.com study sponsored by CEDRO), p. 26

4.3.2. Case 2: Advertising model

Even for the companies, which, as examined in Case 1, expect to turn profits from paying subscribers, it essential to conduct advertising activity as an additional (or even primary) source of income. The reason for it is that several studies have shown that only 5-15% of users are willing to pay for content of the online platforms.[135]

Any platform with a significant pool of regular users is attractive for the advertisers since the collected users' personal data can be analysed to perform the market segmentation[136] and display better targeted, more efficient advertisement. The use of such information for the analysis, regardless whether it is conducted by the platform itself or by the advertisers, represents an essential prerequisite of the profits generation for both parties. This reasoning affects the way how the value creation chain may be regarded for VAT purposes in this case.

The VAT is a non-cumulative tax on consumption, which is intended to be wholly borne by the final consumer. The collection of VAT by portions at every stage of the value chain minimises the risks of the tax revenue losses. In the end, the sum of VAT collected at all stages should be equal to VAT paid by the final consumer. In case of the platforms, which rely on the revenues from the advertisement activity, the value creation chain may be described as follows. The users (private individuals) are not final consumers as usually, but the first suppliers in the chain: the platform buys (in exchange for access to its resources) personal data from users. Subsequently, the company uses this data to attract the advertisers or license it to the third parties, such as analytics agencies. It follows that the initial "purchase" of users' personal data constitutes the purchase of the resources for the following economic transactions. However, if in the conventional value chain, the VAT should be paid and subsequently deducted at every stage, in the examined situation no VAT is due on the transaction between the platform and users. At the same time, the company has no right to deduction. This effectively leads to the postponed taxation with not budget losses: the amount of the VAT collected is the same as if the tax was paid by the platform on the "purchase" of personal data. Thus, it might be claimed that there is no need to introduce the taxation at the first stage of the chain if the existing treatment results in no VAT revenue losses.

The argument challenging this approach relates to the status of the private individuals when they provide personal data. As mentioned in section 3.3, it is unlikely that they would qualify as taxable persons, while, as a rule, all actors in the VAT chain should have this status. Therefore, the treatments of users as the first suppliers in the value chain does not fit into an existing VAT system. Since,

[135] "New business models in the digital age",(A dosdoce.com study sponsored by CEDRO), p. 25

[136] "Market segmentation refers to the aggregating of prospective buyers into groups, or segments, that have common needs and respond similarly to a marketing action' ("Investopedia", website)

as described, there is no risk of the VAT losses, the possibility to apply special rules to the described scenario, such as, e.g. the regime of exemption with no right to deduct the input VAT, might be subject to further research.

4.3.3. Common conclusion for Case 1 and Case 2

Summing up, in case of the platforms which rely on the "Freemium/Premium" model or generate a significant part of its income from advertising activity, the factual circumstances can be interpreted from a VAT perspective in the number of ways. The alternative approaches described above consider the economic reality of the businesses and raise the question of potential double taxation if personal data is treated as a consideration for the B2C supplies of e-services free of charge. The proper amount of VAT, as illustrated above, can be fully collected at the point, where the platform receives the monetary remuneration from either paying customers or the advertisers.

4.4. Personal data and its role in the digital economy

Assuming that the alternative interpretations are less suitable than the treatment of personal data as consideration for VAT purposes, there are practical issues related the nature of personal data and its role in the digital economy. Along with problems discussed in section 4.2, they may challenge the application of the VAT to the transactions in question.

Firstly, while the VAT system does not introduce any minimum threshold for the level of consideration, its valuation of is required to distinguish a proper consideration from the negligible one, which may result in the treatment of the activity as non-economic.[137] From both legal and economic point of view, personal data represents an asset which is hard to value.[138] On the one hand, the functioning of the online platforms illustrates that nowadays the big data is a valuable asset for all of them: the collection of information on a large scale, which is processed and matched with different types of data, influences the business decisions of the platforms.[139] The big data, by its nature, arguably constitutes the new information, but not just the sum of users' personal data.[140] Therefore, the raw, not analysed information about one individual, without being put in the context of other users' information, might have relatively small importance for the platform. On the other hand, it is hardly rebuttable that personal data as a

[137] See e.g. case 50/87 *Commission of the European Communities v French Republic*

[138] C. Langhanke, M.Schmidt-Kessel, (2015).

[139] "*New Technology, Big Data and the Law*", Editors: Corrales, Marcelo, Fenwick, Mark, Forgó, Nikolaus (2017), p.21

[140] Jens-Erik Mai (2016). "Big data privacy: The datafication of personal information", The Information Society, p.7

component of the big data – the smallest and inevitable elements –is itself compulsory and valuable for the platforms.

Secondly, even if personal data can, by its nature, serve a consideration, the problem is that nowadays the use of almost any online resource involves the constant flow of personal data. Regardless, whether the access of the website is paid or free of charge, all profit-oriented web-companies collect the personal data of its users. The proper analysis and application of the collected data allow them to identify the customers' experience and adjust the services accordingly.[141] For this reason, it can hardly be claimed that there is causality between the granting of access to the website free of charge and the provision of personal information. For example, when the website provides free limited access or paid full access to its users (see section 4.3.1), the clients do not choose between the provision of personal data or the monetary payment. Even in case of the "paid option", the platform still requires completing the registration procedure or saves the information from an existing profile. The user's activity on the website is still tracked, his location and other personal information are collected and analysed. It follows that the direct link between personal data and the access to a website is missing.

To conclude, these arguments prove that even if the personal data can potentially qualify as a consideration, it might not be the case for the B2C activity of the online platforms. In the era of the extensive collection and use of personal data by digital companies, the necessary direct link between the supply in question and the personal data provided can hardly be established.

5. Conclusion

The present research focused on the digital platforms which interact with business customers (advertisers and other third parties) and users, who are usually private individuals. Two features are typical for most of these businesses: firstly, they allow users access their online resources or services free of charge and, secondly, the users' personal data, collected prior and during the use of the platform, serves the companies' commercial purposes. Moreover, from an economic perspective, this personal data is perceived as a "new currency", since the platforms are ready to accept it instead of the monetary payment. This line of reasoning leads to the hypothesis that from a VAT perspective the taxable transaction occurs when a platform provides access to its electronic resources in exchange for personal data, which constitutes, thus, a consideration.

[141] Netflix: an examples of how the users' data is effectively analyzed to increase the sales. (Bernard Marr (2016). p. 17)

The relevant VAT rules along with their judicial interpretation were examined to analyse the possibility of levying VAT on the supply of access to the platforms for the consideration in personal data. It was concluded, that even if, from the theoretical point of view, the platform can qualify as a taxable person, and the provision of access to its online resources constitutes the supply of electronic services, there are difficulties with the expression of personal data in monetary terms. The CJEU guidance on the methods of valuation does not provide the definitive solution for all possible barter transaction. Nevertheless, the existing case law suggests that the costs borne by the platform in relation to the B2C supply of e-services should be considered. Moreover, the real-life examples illustrated that the legal relationships between the platforms and its users lack the binding nature, which jeopardises the presence of the direct link. All factors considered, the VAT taxation of the supply of e-services to users free of monetary charge, supposing that the consideration takes the form of personal data, does not fit into existing VAT system, as it is applicable and interpreted so far.

Furthermore, even if the legal VAT requirements are deemed to be satisfied, the taxation of the transaction in question is practically problematic due to the nature and the role of personal data in the modern digital economy. Firstly, it is not clear how valuable the personal information of one individual until it is put into the context of other users, analysed and transformed into the big data. Secondly, the provision of personal data represents an inevitable element of the use of any online platforms, regardless whether there is or no payment attached. The constant flow of this information makes it hard to connect the data in question to any specific supply on the part of the digital company.

Finally, the assumption that personal data constitute consideration for the “free” supply of access to the platforms is only one possible interpretation of the factual circumstances in question. The analysis of the specific business models in section 4.3.1-4.3.3 illustrate how differently an economic reality can be regarded from a VAT perspective. The primary goal, then, is to choose the interpretation which will fit the best into the existing VAT system. As the present thesis suggests, the treatment of personal data as a consideration raises significant theoretical and practical difficulties.

Bibliography

EU legal acts

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, pg. 1–118

Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax, JOP_1967_071_1303_005

Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, OJ L 77, 23.3.2011, p. 1–22

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1–88

Books

Ben Terra, Julie Kajus,(2018). "*A Guide to the European VAT Directives 2018*", ISBN: 978-90-8722-437-0 (vol. 1), 978-90-8722-439-4 (vol. 2)

Bernard Marr (2016). "*Big Data in Practice: How 45 Successful Companies Used Big Data Analytics to Deliver Extraordinary Results*", John Wiley & Sons, ISBN: 1119231388, 9781119231387

Cristina Trenta (2013). "*VAT in peer-to-peer content distribution: towards a tax proposal for decentralised networks*", (JIBS Dissertation Series No. 90 2013)

Francesco Cannas "The new Models of the Digital Economy and New Challenges for VAT Systems", in M. Lang and Ine Lejeune (eds.), "*VAT/GST in a Global Digital Economy*" (Kluwer 2015)

Marc van Lieshout (2015). "The Value of Personal Data". In: Jan Camenisch, Simone Fischer-Hubner, Marit Hansen (eds). "*Privacy and Identity Management for the Future Internet in the Age of Globalisatio*n"; pp. 26-38; London: Springer Verlag; 2015.

Sjoerd Douma (2014). "*Legal Research in International and EU Tax Law*", (Kluwer 2014)

"*New Technology, Big Data and the Law*", Editors: Corrales, Marcelo, Fenwick, Mark, Forgó, Nikolaus (2017), Springer, Singapore, 978-981-10-5037-4

"*VAT/GST in a Global Digital Economy"*, edited by Michael Lang, Ine Lejeune (2015), ISBN: 9789041159526

Academic Articles

A.M. Bal (2018). "United Kingdom/European Union - Managing EU VAT Risks for Platform Business Models", Bulletin for International Taxation", 2018 (Volume 72), No 4a/Special Issue

Beyer, M.A. & Laney, D. (2012). "The Importance of 'Big Data': A Definition", Gartner Publications, pp.1–9.

Carmen Langhanke, Martin Schmidt-Kessel (2015). "Consumer Data as Consideration", 4 Journal of European Consumer and Market Law, Issue 6, pp. 219

C. Zhang and W. D. He (2013). "Impact of Indirect Network Effect between Two Sides on the Diffusion and Pricing of Platform", Applied Mechanics and Materials, Vols. 380-384, pp. 4448-4451, 2013. Available: http://download.atlantis-press.com/php/download_paper.php?id=5941. Download date: 16-05-2018

Deborah Butler (2002). "The VAT treatment of goods as non-monetary consideration: the approach taken by courts in the United Kingdom in the light of the general principles established by the European Court of Justice", 11 EC Tax Review, Issue 4, pp. 191–291

Deborah Butler (2004). "The usefulness of the `direct link' test in determining consideration for VAT purposes" 13 EC Tax Review, Issue 3, pp. 92–102

Jens-Erik Mai (2016). "Big data privacy: The datafication of personal information", The Information Society, 32:3, 192-199

J.J.P Swinkels (2006). "Halifax day: abuse of law in European VAT", International VAT Monitor, 2006 (Volume 17), No. 3

Heiko Wieland, Nathaniel N. Hartmann, Stephen L. Vargo (2017). "Business models as service strategy", Journal of the Academy of Marketing Science, 2017, Volume 45, Number 6, pp 925–943

Karl Täuscher (2016).”Business Models in the Digital Economy: An Empirical Study of Digital Marketplaces”, Fraunhofer MOEZ, Fraunhofer Center for International Management and Knowledge Economy, Working Paper 2016 Nr. 2.Available:https://www.imw.fraunhofer.de/content/dam/moez/de/documents/Working_Paper/Working_Paper_Digital_Marketplaces_final.pdf. Download date: 10-05-2018

Martin Schmidt-Kessel (2015). “Consumer Data as Consideration”, 4 Journal of European Consumer and Market Law, Issue 6, pp. 218–223

M.W. Van Alstyne, G.G. Parker & S.P.(2016). “Pipelines, Platforms, and the New Rules of Strategy”, Harvard Business Review. [Electronic]. Available: https://hbr.org/2016/04/pipelines-platforms-and-the-new-rules-of-strategy. Download date: 10-04-2018

Portilla, Idoia (2018). “Privacy concerns about information sharing as trade-off for personalized news”. El Profesional de la información, v. 27, n. 1, pp. 19-26.

Tom Evens & Kristin Van Damme (2016). “Consumers’ Willingness to Share Personal Data: Implications for Newspapers Business Models”, International Journal on Media Management, 18:1, 25-41,

Sebastian Pfeiffer (2016). “VAT on ‘free’ electronic services?”, International VAT Monitor, 158-164

Official publications

OECD, Working Party No 9. “Consumption Tax Aspects of Electronic Commerce”, 2001

World Business Council for Sustainable Development (2011) “Collaboration, innovation, transformation: Ideas and inspiration to accelerate sustainable growth - A value chain approach”

World Investment Report 2017, Chapter 4: “Investment and The Digital Economy”, UNCTAD, United Nations. [Electronic] Available:

http://worldinvestmentreport.unctad.org/world-investment-report-2017/chapter-4-investment-and-the-digital-economy/. Access date: 16-05-2018

Information Providers Guide, European Commission, section “Cookies”, http://ec.europa.eu/ipg/basics/legal/cookies/index_en.htm. Access date: 02-05-2018

Other

"New business models in the digital age", (A dosdoce.com study sponsored by CEDRO),Available:http://www.dosdoce.com/upload/ficheros/noticias/201504/new_business_models_in_the_digital_age__bookmachine_special_edition.pdf. Download date: 10-05-2018

Statistic Portal "Statista". Page: "Number of internet users worldwide from 2005 to 2017 (in millions)". Available: https://www.statista.com/statistics/273018/number-of-internet-users-worldwide/. Download date: 20-05-2018

BBC News, "How does Twitter make money?", by Pia Gadkari, 7.10.2013, [Electronic] Available: http://www.bbc.com/news/business-24397472. Access date: 10-05-2018

The definition of "barter": https://www.investopedia.com/terms/b/barter.asp

The definition of "cookies": PC Encyclopedia [Electronic]. Available: https://www.pcmag.com/encyclopedia/term/40334/cookie. Access date: 10-05-2018

The definition of the "Market Segmentation": Investopedia [Electronic]. Available: https://www.investopedia.com/terms/m/marketsegmentation.asp. Access date: 10-05-2018

Amazon website: https://www.amazon.jobs/working/working-amazon. Access date: 01-05-2018

Facebook Privacy Policy: https://www.facebook.com/about/privacy/update. Access date: 18-05-2018

Spotify Terms and Conditions of Use: https://www.spotify.com/uk/legal/end-user-agreement/. Access date: 19-05-2018

Table of Cases

Case 154/80, Staatssecretaris van Financiën v Association coopérative "*Coöperatieve Aardappelenbewaarplaats GA*" [1981] ECLI:EU:C:1981:38

Case 89/81, Staatssecretaris van Financiën v *Hong-Kong Trade Development Council* [1982] ECLI:EU:C:1982:121

Case 268/83, D.A. *Rompelman* and E.A. Rompelman-Van Deelen v Minister van Financiën [1985] ECLI:EU:C:1985:74

Case 235/85, *Commission of the European Communities v Kingdom of the Netherlands* [1987] ECLI:EU:C:1987:161

Case 102/86, *Apple and Pear Development Council* v Commissioners of Customs and Excise [1988] ECLI:EU:C:1988:120

Case 50/87, *Commission of the European Communities v French Republic* [1988] ECLI:EU:C:1988:429

Case 230/87, *Naturally Yours Cosmetics Limited* v Commissioners of Customs and Excise [1988] ECLI:EU:C:1988:508

Case C-320/88, Staatssecretaris van Financiën v Shipping and Forwarding Enterprise *Safe* BV [1990] ECLI:EU:C:1990:61

Case C-186/89 *W. M. van Tiem* v Staatssecretaris van Financiën [1990] ECLI:EU:C:1990:429

Case C-202/90, *Ayuntamiento de Sevilla* v Recaudadores de Tributos de las Zonas primera y segunda [1991] ECLI:EU:C:1991:332

Case C-333/91, *Sofitam* SA (formerly Satam SA) v Ministre chargé du Budget [1993] ECLI:EU:C:1993:261

Case C-16/93, R. *J. Tolsma* v Inspecteur der Omzetbelasting Leeuwarden [1994] ECLI:EU:C:1994:80

Case C-33/93, *Empire Stores Ltd* v Commissioners of Customs and Excise [1994] ECLI:EU:C:1994:225

Case C-110/94, Intercommunale voor zeewaterontzilting (*INZO*) v Belgian State [1996] ECLI:EU:C:1996:67

Case C-330/95, *Goldsmiths (Jewellers) Ltd* v Commissioners of Customs & Excise [1997] ECLI:EU:C:1997:339

Case C-384/95, *Landboden-Agrardienste* GmbH & Co. KG v Finanzamt Calau [1997] ECLI:EU:C:1997:627

Case C-172/96, Commissioners of Customs & Excise v First National Bank of Chicago [1998] ECLI:EU:C:1998:35

Case C-380/99, *Bertelsmann AG* v Finanzamt Wiedenbrück [2001] ECLI:EU:C:2001:372

Case C-398/99, *Yorkshire Co-operatives Ltd* v Commissioners of Customs & Excise [2003] ECLI:EU:C:2003:20

Case C-16/00, *Cibo* Participations SA v Directeur régional des impôts du Nord-Pas-de-Calais [2001] ECLI:EU:C:2001:495

Case C-174/00, *Kennemer Golf & Country Club v Staatssecretaris van Financiën* [2002] ECLI:EU:C:2002:200

Case C-25/03 Finanzamt Bergisch Gladbach v *HE* [2005] ECLI:EU:C:2005:241

Case C-412/03, *Hotel Scandic Gåsabäck AB* v Riksskatteverket [2005] ECLI:EU:C:2005:47

Case C-210/04, Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v *FCE Bank plc* [2006] ECLI:EU:C:2006:196

Case C-369/04, *Hutchison 3G UK Ltd and Others v Commissioners of Customs and Excise* [2007] ECLI:EU:C:2007:382

Case C-246/08, *Commission of the European Communities v Republic of Finland* [2009] ECLI:EU:C:2009:671

Case C-267/08, *SPÖ* Landesorganisation Kärnten v Finanzamt Klagenfurt [2009] ECLI:EU:C:2009:619

Case C-40/09, *Astra Zeneca UK Ltd v Commissioners for Her Majesty's Revenue and Customs* [2010] ECLI:EU:C:2010:450

Joined case, *Loyalty Management UK Ltd* (C-53/09) and B*axi Group Ltd* (C-55/09), [2010] ECLI:EU:C:2010:590

Joined cases C-180/10 and C-181/10, Jarosław *Słaby* v Minister Finansów (C-180/10) and Emilian Kuć and Halina Jeziorska-Kuć v Dyrektor Izby Skarbowej w Warszawie (C-181/10) [2011] ECLI:EU:C:2011:589

Case C-480/10, *European Commission v Kingdom of Sweden* [2013] ECLI:EU:C:2013:263

Case C-549/11, Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — grad Burgas pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite v *Orfey Balgaria EOOD*, [2012] ECLI:EU:C:2012:832

Case C‑ 62/12, *Galin Kostov* v Direktor na Direktsia 'Obzhalvane I upravlenie na izpalnenieto' [2013] ECLI:EU:C:2013:391

Case C‑151/13, *Le Rayon d'Or SARL* v Ministre de l'Économie et des Finances [2014] ECLI:EU:C:2014:185

Case C-276/14, *Gmina Wrocław* v Minister Finansów [2015] ECLI:EU:C:2015:635

Case C-11/15, Odvolací finanční ředitelství v *Český rozhlas* [2016] ECLI:EU:C:2016:470

Case C-263/15, *Lajvér* Meliorációs Nonprofit Kft. and Lajvér Csapadékvízrendezési Nonprofit Kft. v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága (NAV) [2016] ECLI:EU:C:2016:392

Case C-432/15, Odvolací finanční ředitelství v *Pavlína Baštová* [2016] ECLI:EU:C:2016:855

Opinion of Advocate General

Case 102/86, Opinion of Mr Advocate General Sir Gordon Slynn, *Apple and Pear Development Council* v Commissioners of Customs and Excise [1987] ECLI:EU:C:1987:466

Case C-186/89, Opinion of Mr Advocate General Van Gerven, *W. M. van Tiem* v Staatssecretaris van Financiën [1990] ECLI:EU:C:1990:333

Case C-277/05, Opinion of Mr Advocate General Poiares Maduro, *Société thermale* d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie [2006] ECLI:EU:C:2006:555

Case C-267/08, Opinion of Mr Advocate General Poiares Maduro, *SPÖ* Landesorganisation Kärnten v Finanzamt Klagenfurt [2009] ECLI:EU:C:2009:441

Case C-62/12, Opinion of Mr Advocate General Wathelet, *Galin Kostov* v Direktor na Direktsia «Obzhalvane I upravlenie na izpalnenieto» - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite [2013] ECLI:EU:C:2013:129

Case C-36/16, Opinion of Advocate General Kokott, Minister Finansów v *Posnania Investment* SA [2017] ECLI:EU:C:2017:134